

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

October Term, 1977

No. ... **77-1348**

THE STATE OF CONNECTICUT,

Petitioner,

v.

RALPH PENLAND,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT

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The petitioner, the State of Connecticut, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on January 3, 1978.

I. Citation

A decision of the Connecticut Supreme Court, *State v. Ralph Penland*, Vol. XXXIX, No. 27, Conn. L.J. p. 3 (January 3, 1978), a copy of which is annexed hereto. Said decision is reported as *State v. Penland*, —Conn.—, —A.2d— (1978).

II. Jurisdictional Grounds

On January 3, 1978, the Connecticut Supreme Court entered judgment upholding the dismissal of charges against Ralph Penland for the crime of possession of narcotics. The Jurisdiction of this Court is invoked under authority of 28 U.S.C. Section 1257 (3).

III. Questions Sought to be Reviewed

A. Was probable cause established where an informant reported that he had just observed a possession and sale of narcotics by two individuals at a specified location and advised that they would leave the location within minutes and enter a particular car described by the informant, and the officer receiving the information, who knew the two individuals from previous narcotics investigations, went to the scene within minutes and observed both individuals leave together and enter the particular car?

B. Where the officer acts upon this information and alleges that the informant had been reliable in the past, should the Court suppress the use of the evidence seized upon the arrest and search of the two individuals?

IV. Constitutional and Statutory Provisions

The State of Connecticut relies upon the following provisions of the Connecticut General Statutes:

Sec. 6-49. Arrest without warrant. Pursuit outside precincts. Sheriffs, deputy sheriffs, county detectives, constables, borough bailiffs, police officers, special protectors of fish and game and railroad and steamboat policemen, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when such person is taken or

apprehended in the act or on the speedy information of others, and members of the state police department or of any local police department or county detectives shall arrest, without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony. Members of any local police department, when in immediate pursuit of one who may be arrested under the provisions of this section, are authorized to pursue such offender outside of their respective precincts into any part of the state in order to effect the arrest. Such person may then be returned in the custody of such officer to the precinct in which the offense was committed. Any person so arrested shall be presented with reasonable promptness before proper authority.

Sec. 19-481. Penalty for illegal possession. Substitution of medical treatment for criminal sanctions. (a) Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than three thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years, or be fined not more than five thousand dollars, or be both fined and imprisoned; and for any subsequent offense may be imprisoned not more than twenty-five years, or be fined not more than ten thousand dollars, or be both fined and imprisoned.

* * * * *

V. Statement of the Case

The defendant, Ralph Penland of Derby, Connecticut, was charged with the crimes of Possession of Heroin and Possession of Narcotics, Methadone. A Motion to Suppress Evidence was

filed by the defendant and after an evidentiary hearing, the motion was granted. Thereafter, a Motion to Dismiss the charges was granted and the State appealed to the Connecticut Supreme Court which rendered its opinion on January 3, 1978, upholding the trial court. The State's Motion to Reargue was denied by the Court on January 25, 1978.

VI. Statement of Facts

Shortly after 5:15 P.M. on November 30, 1974, Det. Thomas Hunt of the Naugatuck Police Department, an experienced narcotics investigator, received a telephone call from an informer. Det. Hunt claimed that this informant had supplied information in the past which led to two arrests and convictions involving narcotics.

The informant related to Hunt that at Tony's Bar on Burr Avenue in Naugatuck at 5:15 P.M. the informant saw "Tree" Babarik and Ralph Penland, both white males, sell two bags of heroin to another white male, that Penland handed the bags to the purchaser and Babarik took the money, that he overheard a conversation between Penland and Babarik in which he heard that they would be leaving the bar in a few minutes and would be operating a blue Dodge Dart automobile. The informant was familiar with the manner in which heroin was sold in small foil bags for money.

Detectives, including Hunt, then went to the bar within about five minutes after receiving the information and saw Penland and Babarik, whom they knew through previous narcotic investigations, leave the bar together. They were observed by the officers entering a four-door blue Dodge Dart.

Penland and Babarik were arrested for possession of narcotics as they were seated in the front seat of the vehicle. Within an

arm's reach of them, a search by the officers revealed narcotics paraphernalia used to shoot heroin, a syringe and bottle cap. In open view on the back seat was a bottle of methadone, another narcotic drug.

These facts were taken from the trial court's Finding. (See Appendix) Under Connecticut practice, the Finding is the binding conclusion of the trial court as to the facts. The trial court, as the trier of fact, has the power to determine what facts have been proven. *Cappiello v. Haselman*, 154 Conn. 490 (1967). Indeed, the *Connecticut Practice Book* states in part, "The finding shall set forth . . . all facts which the court finds proven . . .". Chapter 26, Section 619.

VII. Argument of Law

A. PROBABLE CAUSE WAS ESTABLISHED TO ARREST THE DEFENDANT AND SEARCH HIS AUTOMOBILE.

Aguilar v. Texas, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), requires that the following must be shown in order to establish "probable cause" from an informant's report: (1) the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were; and (2) the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

In this case the underlying circumstances from which the informant concluded that the narcotics were in the possession of Penland and Babarik were that the informant, who was familiar with narcotics transactions, personally observed Penland and Babarik in possession of a quantity of heroin, and he also personally observed them sell heroin to an unknown white male. It is submitted that no better "underlying circumstances" than the first hand personal observation of the informant could be shown.

As regards to the reliability of the information supplied to Detective Hunt by the informant, two aspects of the information were subsequently and quickly corroborated. That is, the informant told Det. Hunt that the two men would be leaving Tony's Restaurant shortly. When the officers arrived at the restaurant in about five minutes, they observed Penland and Babarik leaving together. The officers then observed the defendants walk across the street and both get into a four-door blue Dodge Dart, which, of course, corroborated the information that the pair was driving a Blue Dodge Dart.

Petitioner submits that the requirements of *Aguilar* were more than adequately met in the instant case. It is further submitted that the facts and circumstances within Det. Hunt's knowledge, including his knowledge of the defendants in his past narcotic investigations, and of which he had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or was being committed.

The validity of the arrest in this case is to be decided under Section 6-49 of the Connecticut General Statutes, which permits police officers to arrest without previous complaint and warrant any person the officer has "reasonable grounds" to believe has committed a felony. *State v. Wilson*, 153 Conn. 39, 41 (1965). In this connection "reasonable grounds" is to be equated with "probable cause". *Henry v. United States*, 361 U.S. 98, 4 L.Ed. 2d 134, 80 S. Ct. 168 (1959).

The trial judge and the Connecticut Supreme Court concluded that based upon the principles found in *Aguilar*, the credibility of the informant and his information was not established. The Connecticut Supreme Court opinion relied upon *Spinelli v.*

United States, 393 U.S. 410, 413, 21 L. Ed.2d 637, 89 S. Ct. 584 (1969) also to the effect that the innocent activities observed by the officer were insufficient to corroborate the information.

In *United States v. Harris*, 403 U.S. 573, 29 L. Ed 2d 723, 91 S.Ct. 2075 (1971), this court explained the principles underlying *Aguilar* and *Spinelli*. A majority of the court concluded that the affidavit in that case was sufficient to establish probable cause for the search. That affidavit did not include an averment that the informant had previously given correct information, and neither the name nor person of the informant was produced before the magistrate. This court concluded that the affidavit contained an "ample factual basis" for believing the informant, when considered with the affiant's own knowledge of the accused's past activities.

The officer in this case certainly had as much from which to arrive at probable cause as the magistrate in *Harris*. The informant was present and personally observed the heroin being very recently sold, the information given by the informant, i.e., as to the presence of the two defendants and their leaving the bar together and going to a particular car, was verified by the officer's own observation, *Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79S. Ct. 329 (1959), *McCray v. Illinois*, 386 U.S. 300, 305, 18 L. Ed. 2d 62, 67, 87 S.Ct. 1056 (1967), as well as the officer's own knowledge of the defendants through prior narcotics investigation. *Harris v. United States*, supra, *Jones v. United States*, 362 U.S. 257, 271, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960).

Draper has never been overruled and since *Spinelli* has been modified, to say the least, by *Harris*, the petitioner submits that the present law as announced by this court appears to sustain the officer's actions in this case. In the interest of fairness to law enforcement agents seeking to follow the decisions of this Court, the Petitioner asks this Court to review the Connecticut Supreme Court decision.

B. THE COURT ACTED IMPROPERLY IN
SUPPRESSING THE SEIZED EVIDENCE
DISCOVERED DURING THE ARREST
AND SEARCH OF THE DEFENDANT.

The trial judge found the information from the informant incredible because the search turned up items other than packaged heroin and no money was seized from the defendants. This reasoning, not followed by the Connecticut Supreme Court, was obviously incorrect as the results of a search could not affect the existence of probable cause at the time of the arrest.

Cf. *Johnson v. United States*
333 U.S. 10, 17, 92 L.Ed. 436, 68 S.Ct. 367 (1948)

United States v. DiRe
332 U.S. 581, 595, 92 L.Ed. 210, 68 S.Ct. 222 (1948)

The trial judge, after filing a Memorandum of Decision which referred to a recital that the informant had given reliable information in the past, prepared a Finding of Fact for the State's appeal (Appendix, Page 4a) which found the officer received the call from "an alleged reliable informant" who "it is alleged" had in the past caused two narcotics convictions. The Finding, under Connecticut practice, controls.

Connecticut Practice Book, Section 619

The Connecticut Supreme Court translated that Finding into a conclusion that the officer thereby failed to convince the trial judge that the informant was credible and his information reliable.

It was not for the trial judge to decide, as a magistrate, whether the informant was credible or his information reliable; it was rather his obligation to decide if the officer, given the established

facts, had reasonable grounds to believe the informant and his information. *McCray v. Illinois*, supra, at 300, 305-6. The Petitioner submits the facts found by the trial judge as set forth in the Finding, as outlined in Part A, give rise to such reasonable grounds.

The Petitioner recognizes the preference for warrants expressed in *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965) but points out that in this case, the moment probable cause was established was the moment for the officers to act if they were to be effective, and that moment arrived when the defendant and his companion entered the particular motor vehicle.

The court has established a rule that illegally seized evidence may not be admitted in evidence against a criminal accused. That rule, the Petitioner submits, permits the kind of judicial reasoning illustrated by this case and has created division between lines of cases very narrowly decided by this Court, under which law enforcement agents operate in split second situations, sometimes to their peril, but always to the peril of an innocent society which is vitally concerned in law enforcement. It is difficult to see in this case, as in many, that the exclusionary rule has any reason then to reward the guilty for the mistakes, if they be such or are later called such, of the law enforcement agent.

A substantial and vital judicial controversy arising out of this Court's past decisions would be settled if this Court granted certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Petitioner, State of Connecticut

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APPENDIX

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SUPERIOR COURT,
JUDICIAL DISTRICT OF WATERBURY

NO. 12079,

STATE OF CONNECTICUT

v.

RALPH PENLAND

MEMORANDUM ON MOTIONS
TO SUPPRESS EVIDENCE

The defendant's have moved to suppress as evidence, heroin, controlled drugs and other items seized from them, on the ground that the automobile in which they were driver and passenger and their persons were illegally searched inasmuch as no search or arrest warrant had been obtained and there existed no probable cause for the search of the vehicle or the persons. Since the motions are the same in both cases, the memorandum will cover both defendants.

The facts as presented in the defendants' exhibit 1 indicate that three police officers received the following information from an informant: That at Tony's Bar on Rubber Avenue, Naugatuck, at 5:15 p.m., he saw one Tree Babarik and one Ralph Penland, both white males, sell two bags of heroin to another white male, that Penland handed the bags to the purchaser and Babarik took the money, that he overheard a conversation between Penland and Babarik in which he heard that they would be leaving the bar in a few minutes. The informant is described as follows: "... a known and reliable informant who has supplied information in the past" The detectives went to the area of the bar and stopped an automobile which Babarik was operating and arrested him and the passenger Penland for possession of heroin. A coincident search of the vehicle and the persons of Babarik and

Penland disclosed a set of works (needle, syringe, bottle cap, and cotton ball) under the dashboard, a bottle of methadone on the rear seat, four yellow football slips on the person of Babarik as well as a white paper with a football line on it and a yellow paper containing a football line.

It is the established law of this state that in order to make an arrest there must be probable cause of the commission of a crime. *State v. DelVecchio*, 149 Conn. 567, 574. The validity of the arrest is to be determined under § 6-49 of the General Statutes which permits members of organized local police departments to arrest without previous complaint and warrant any person who the officer has reasonable grounds to believe has committed a felony. *State v. Wilson*, 153 Conn. 39, 41. "In this connection 'reasonable grounds to believe' is to be equated with 'probable cause'. *Henry v. United States*, 361 U.S. 98, 100, 102" *State v. Wilson*, supra, 41. "As the latter term implies, we are dealing with probabilities, and our determination is to be reached by an application of the factual and practical considerations of everyday life on which reasonable and prudent men act. *Brinegar v. United States*, 338 U.S. 160, 175" *State v. Wilson*, supra, 41. Here the only information that a crime had been committed was the word of the informant. Reports furnished by paid police informants, recent arrestees or anonymous informants who supply information confidentially, usually for reasons other than that they are doing their duty as good citizens, require a test of their reliability through past experiences with him or through corroboration of the essential elements of his information. *People v. Hogan*, 80 Cal. Rptr. 28, 29; *People v. Lewis*, 240 Cal. App. 2d 546, 550.

In the instant case the only recital of the informant's reliability is that he was known and reliable, the latter a conclusion, and had given reliable information in the past. The underlying circumstances from which the officer concluded that the informant was

credible or his information reliable were not established. *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509. Certainly there is no corroboration of the informant's information of the possession of heroin or the sale thereof, prior to the arrest, or of the fact that the substance he saw change hands was in fact heroin. See *United States v. Colon*, 419 F. 2d 120; *United States v. Shipstead*, 433 F. 2d 368; *Jones v. United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S.Ct. 725. A record of previous reliability of an informer with respect to the type of crime at issue is indeed crucial where probable cause is bottomed solely on the informer's unverified report. *United States v. Manning*, 448 F. 2d 992, 998.

The sole information was that of an informer whose credibility and reliability were not established so that his information could be the basis of a finding of probable cause. Without probable cause for the arrests, the search incident thereto was illegal and therefore the evidence secured by that search may not be used by the state in the presentation of its case against these defendants.

The motions to suppress evidence are granted.

Levine, J.
July 2, 1976

SUPREME COURT OF THE
STATE OF CONNECTICUT

NO. 8332, State of Connecticut v. Ralph Penland

FINDING

FIRST: The following facts are found:

1. Detective Thomas Hunt of the Naugatuck police department is a narcotics undercover agent assigned to the Naugatuck Valley Regional Crime squad.
2. Detective Hunt had investigated numerous narcotic transactions which resulted in arrests in the past.
3. On November 30, 1974, Detective Hunt received a telephone call, a little after 5:15 p.m., from an alleged reliable informant.
4. It is alleged that this informant had in the past supplied information to Detective Hunt that led to two arrests and convictions, one for possession of narcotics and one for sale of narcotics.
5. The informant told Detective Hunt that the informant was present in Tony's Restaurant, a bar on Burr Avenue in Naugatuck, and had observed Ralph Penland and Robert Babarik in possession of a quantity of heroin and did personally observe him sell two bags of heroin to another man.
6. Penland handed the bags of heroin to a white male and Babarik received the money in return in the sight of the informant and the informant overheard a conversation between Penland and Babarik that they would be leaving the car in a few minutes.
7. The informant was familiar with the manner in which heroin was sold in small foil bags for sums of money.

8. The informant told Detective Hunt that he observed the sale by both Penland and Babarik about 5:15 p.m.
9. Detective Hunt called two other detectives and they went to the area of Tony's Restaurant.
10. The police report stated the caller observed Penland hand two bags of heroin to a white male and Babarik took money in return. The report further states the informant overheard a conversation between Penland and Babarik that they would be leaving the bar in a few minutes.
11. The informant also told Detective Hunt that Penland and Babarik were operating a blue Dodge Dart and that they would be leaving the area very shortly.
12. Detective Hunt and the other detectives arrived at the area of the bar within about five minutes after the telephone call and observed Penland and Babarik leaving Tony's Restaurant, together, one in back of the other.
13. Detective Hunt knew Penland and Babarik through previous investigations in narcotics.
14. Penland and Babarik were observed by Detective Hunt to cross the street, to then enter a four-door blue Dodge Dart.
15. At this point, Detective Hunt and the other officers pulled over to their vehicle and arrested both Penland and Babarik for possession of narcotics in the bar.
16. The vehicle was in operation in a driveway across the street from the bar when they stopped it. Detective Hunt had asked the informant if they had heroin after the sale.
17. The immediate area around Penland and Babarik was searched and narcotics paraphernalia used to shoot heroin, a syringe and bottle cap were found under the front dashboard of the vehicle.

18. At the time of the arrest, Penland and Babarik were seated in the front seat of the vehicle and were within arm's reach of the paraphernalia.

19. In open view on the back seat of the vehicle was a bottle of methadone.

20. This bottle contained a clear liquid and was labeled "methadone", prescribed for one David Smoker, 138 Howard Avenue, New Haven, Connecticut.

21. Detective Hunt recognized the bottle of methadone as contraband.

22. Detective Hunt later testified that he wasn't arresting them for a transaction that had transpired at Tony's Bar.

23. No packaged quantity of heroin was found on the persons of Babarik and Penland.

24. Penland was a passenger in the Babarik vehicle.

25. The officers arrived at the area of Tony's Restaurant about 5:30 p.m.

SECOND: The following conclusion of fact was reached:

26. The informant was incredible since the packaged heroin he said he saw on the defendant was not found after a search of his person nor was any money found on him which would result from the alleged narcotics deal the informant claimed to have seen.

THIRD: The following conclusions were reached.

27. There were no underlying circumstances from which the court could conclude that the informant was credible or his information reliable.

28. There was no corroboration of the informant's information of the possession of heroin or the sale thereof prior to the arrest, or of the fact that the substance he saw change hands was in fact heroin.

29. The arrests of Penland and Babarik were made without probable cause.

30. The search of the vehicle was illegal and the evidence secured by that search was suppressed.

FOURTH: The State made the following claim of law which the court overruled:

31. The arrest of Penland and Babarik was upon probable cause and the search of the vehicle and seizure of narcotic paraphernalia and contraband was legal.

FIFTH:

All exhibits are hereby made a part of the record on appeal and may be used in the Supreme Court without being printed.

Levine, J.

Filed March 22, 1977

CONNECTICUT SUPREME COURT

October Term, 1977

No. 8332

STATE OF CONNECTICUT V. RALPH PENLAND

HOUSE, C. J., LOISELLE, BOGDANSKI, LONGO and SPEZIALE, Js.

Argued October 19, 1977—decision released January 3, 1978

Information charging the defendant with the crimes of possession of heroin and possession of narcotics, brought to the Superior Court in the judicial district of Waterbury where the court, *Irving Levine, J.*, granted the defendant's motion to suppress evidence; on motion by the defendant, the court, *O'Brien, J.*, rendered judgment dismissing the action and discharging the defendant from custody, from which the state has appealed to this court. *No error.*

Walter H. Scanlon, assistant state's attorney, for the appellant (state).

Raymond J. Quinn, Jr., public defender, for the appellee (defendant).

SPEZIALE, J. The sole issue raised in this appeal by the state is whether the court erred in granting the defendant's motion to suppress certain evidence on grounds that the defendant's arrest and the search incident to that arrest were illegal.

Ralph Penland was charged with possession of narcotics, heroin General Statutes § 19-481 (a). The evidence of the crime was seized in a warrantless search of the automobile in which Penland was a passenger, after a warrantless arrest of Penland and his companion. After an evidentiary hearing on the defendant's motion to suppress the seized evidence, the motion was granted

(*Levine, J.*), and a subsequent motion to dismiss the case was also granted (*O'Brien, J.*), because the state conceded that the action could not be maintained without the evidence suppressed.

The crucial question here is whether there was probable cause for the arrest. It is an established rule that a properly conducted warrantless search incident to a lawful arrest is not illegal. *State v. Cobuzzi*, 161 Conn. 371, 373, 288 A.2d 439 (1971), cert. denied, 404 U.S. 1017, 92 S. Ct. 677, 30 L. Ed. 2d 664; *State v. Collins*, 150 Conn. 488, 492, 191 A.2d 253 (1963); 4 Wharton, Criminal Evidence § 725 (13th Ed.). In order for the search to be legal, however, the arrest itself must be valid. *State v. Cobuzzi*, supra, 375; 4 Wharton, loc. cit. Section 6-49 of the General Statutes authorizes a police officer to arrest, without a warrant, "any person who such officer has reasonable grounds to believe has committed or is committing a felony." "Reasonable grounds" is to be equated with probable cause. *State v. Cobuzzi*, supra, 376; *State v. Wilson*, 153 Conn. 39, 41, 212 A.2d 75 (1965). Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that an offense has been or is being committed. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). There is often a fine line between mere suspicion and probable cause, and "[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." *Brinegar v. United States*, supra, 176.

Whether there was probable cause for Penland's arrest can only be determined through scrutiny of the circumstances leading up to the arrest. Detective Hunt, the arresting officer, was the sole witness at the hearing on the motion to suppress. Although he

testified that he was acting on a tip from an informant, the informant was not named and did not appear. Thus, the credibility of Hunt was a crucial factor in evaluating the issue of probable cause.

The court found that on November 30, 1974, Hunt, an undercover narcotics agent, received a telephone call from "an alleged reliable informant." Hunt testified that the informant had in the past supplied him with information that resulted in two arrests and convictions. The informant told Hunt that he was present in Tony's Restaurant in Naugatuck and that he had observed Penland and one Robert Babarik in possession of a quantity of heroin, that he had seen them sell two bags of heroin to another man, and that he had overheard them say they would be leaving in a few minutes. The informant also told Hunt that Penland and Babarik were operating a blue Dodge Dart. Hunt called two other detectives and they went to the area of Tony's Restaurant. They arrived roughly five minutes after receiving the telephone call and observed Penland and Babarik leaving the bar together. Hunt knew Penland and Babarik through previous narcotics investigations. He saw them cross the street and enter a blue Dodge Dart. At this point Hunt and the other detectives pulled over to the defendant's vehicle and arrested both of them for possession of narcotics while in the bar. Then, the immediate area around Penland and Babarik was searched; narcotics paraphernalia were found under the front dashboard, within arm's reach of the men, and a bottle of methadone, which Hunt recognized as contraband, was in open view on the back seat. No packaged quantity of heroin was found on the persons of Babarik or Penland. Contradicting his prior testimony, Hunt later testified that he was not arresting them for a transaction that had transpired at Tony's Restaurant.

The court concluded that there were no underlying circumstances from which it could determine that the informant was credible or his information reliable. See *Spinelli v. United States*,

393, U.S. 410, 413, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). It further concluded that the arrests of Penland and Babarik were made without probable cause and that the search of the vehicle was therefore illegal, requiring suppression of the evidence secured by the search. See *Beck v. Ohio*, supra, 91.

The state contends that Hunt "could most reasonably conclude that the informant was credible because the informant had given information in the past that had led to two arrests and convictions for possession and sale of heroin." The simple answer is that the trial court did not accord any weight to Hunt's testimony as to the credibility or reliability of the informant. The trier of the facts determines with finality the credibility of witness and the weight to be accorded their testimony. "We cannot retry the facts or pass upon the credibility of the witnesses." *Johnson v. Flammia*, 169 Conn. 491, 497, 363 A.2d 1048 (1975).

To support the claim that there was probable cause for the arrest, there was only Hunt's testimony that the informant was reliable and Hunt's unsupported statements that he himself believed Penland and Babarik were in possession of narcotics. As noted, Hunt's credibility was a crucial factor in evaluating the issue of probable cause. A review of Hunt's testimony, as set forth in the appendix to the defendant's brief, reveals numerous contradictory statements. For example, Hunt initially testified that the arrest was made for possession of narcotics in the bar. He later stated that it was for possession of narcotics at the time of the arrest, and that he was not arresting them for a transaction that occurred in Tony's Restaurant. At the hearing, Hunt testified that Penland and Babarik were first seen when they were leaving the bar, yet the police report states that they were initially observed in the car. Although those may appear to be minor inconsistencies, when viewed in context they tend to undermine Hunt's assertion that he had probable cause for the arrest. For instance, the infor-

mant's tip described a transaction that took place in the bar. Yet Hunt testified that the arrest was not based on this transaction. He asserted that the arrest was for possession of narcotics *after* the defendants left the bar, but he was unable to give any clear reasons for believing that they were in possession of narcotics *at that time*, except that it was a reasonable inference to be drawn from the tip regarding the transaction in the bar. Further, it is curious that although he stated that he believed Babarik and Penland were in possession of narcotics when he saw them leaving the bar, he waited until they had crossed the street and entered their car before making the arrest.

The court was assured by Hunt that his informant was reliable; however, the court found that Hunt received a telephone call from "an *alleged* reliable informant." (Emphasis added.) It further found: "It is *alleged* that this informant had in the past supplied information to Detective Hunt that led to two arrests and convictions, one for possession of narcotics and one for sale of narcotics." (Emphasis added.) The only underlying circumstances corroborating the informant's information were that Penland and Babarik left the bar shortly after the call was made and that they were driving a blue Dodge Dart, both apparently innocent activities. See *Spinelli v. United States*, supra, 414. As noted, Hunt clearly failed to convince the court that his information was credible or his information reliable. Hunt *himself* saw nothing which would support a belief that the defendants were in possession of narcotics. Therefore, we hold that the court did not err in concluding that the arrest was made without probable cause and that the search was illegal. The evidence was properly suppressed.

There is no error.

In this opinion the other judges concurred.